THE WESTERN SAVING FUND SOCIETY OF PHILADELPHIA ET AL. *vs.* THE CITY OF PHILADELPHIA AND ROBERT T. CONRAD, MAYOR, &c.	In the Supreme Court of Pennsylvania within and for the Eastern District. In Equity. July Term, 1854. No. 10.

Coram.—Chief Justice Lewis, and
Justices Lowrie, Woodward, Knox and Black.

This case was argued on the 23d of December, A. D. 1854, by B. Gerhard, Esq., and the Hon. William M. Meredith, for plaintiffs, and by Isaac Hazlehurst, Esq., for defendants.

This case arose from an effort which the city councils have been making for some time past, to take possession of the Philadelphia Gas Works. The works were originally erected in 1835, by a stock company, and were conducted with the ordinary thrift and management which always attend upon enterprises guarded by the private interest of those who may be engaged in them. The city, however, reserved the right to take the gas works, at any time, at cost; and in the year 1841 they put into execution the option they had reserved, and took possession of the works, continuing them, however, under the control and management of the same trustees who had acted for the stockholders. The board of trustees of the gas works were composed of twelve citizens of Philadelphia, six of whom were elected by the Select Council, and six by the Common Council; one-third were chosen each year, rendering it impossible to make any sudden, radical change in the management of the business of gas making, which requires scientific knowledge, experience and economy in order to be conducted successfully; besides

which, the works were thus kept out of the political atmosphere. The management of the works has been continued in this form to the present time, with great profit and success, furnishing cheaper and better gas than any works in the Union, and earning for the city, in the shape of invested profits in the works, the large sum of eight hundred thousand dollars, accumulated in less than fourteen years.

In the year 1841, when the city, as we have seen, took possession of the gas works, they paid for the same by issuing a loan, since which time various other loans have been contracted by the city for extending the gas works, all of which the holders allege, have a peculiar security, and so the community at large have thought; and hence these loans have always commanded in the market, a considerably higher price than the ordinary city loans. The gas loan holders particularly rely upon a contract made with them by the city, by the ordinance passed the 17th of June, 1841, entitled, "An ordinance for the further extension and management of the Philadelphia Gas Works," authorizing a loan of $125,000. The ordinance provided, that the certificates of this loan should be transferable and the interest thereon payable at the office of the Philadelphia Gas Works.

It further created a sinking fund in the hands of the trustees, and pledged the faith of the city, the said sinking fund, the buildings, apparatus, pipes, fixtures, and the income and profits of the works, for the punctual payment of the interest, and for the ultimate reimbursement of the principal of all the loans made for, or on account of, the works.

The same ordinance, also, declares that for the further security of the loanholders of said works, the faith of the city should be pledged, that the prices of gas, as then fixed, should not be reduced until the distribution of gas, by pipes, should be completed throughout the city limits, nor at any time so as to reduce the clear profits below eight per cent. per annum on the whole amount of the costs of said works, until all the loans contracted for, or that might thereafter be contracted for, should be paid.

This ordinance provided, in addition, that for the further security of said loanholders, it should be thereby stipulated that the said works should be controlled and managed by a board of trustees, elected and constituted as theretofore; who should have the whole control and management of the said works, and of the said sinking fund, and of all the other funds belonging to said works; and that the said trustees should pay no part of the said funds nor any part of the profit of said works into the city treasury, but should apply and appropriate the same as directed by that ordinance, until the interest and principal of the said loans should be fully paid as they became due to the said loanholders.

Notwithstanding the ordinance just recited, the city not only seeks to take into its own hands the management of those works, but when, from the rise of wages and the price of materials, the profits have fallen below even six per cent. on the cost of the works, the city refuses to raise the price of gas. The corporation is, besides, largely in arrear for the price of the gas consumed in the public lamps in the old city, and by some of the late districts, and refuses to pay the amount due therefor to the trustees.

The counsel for the plaintiffs contended, that the ordinance of June 17th, 1841, and the certificates of loan issued under the authority of said ordinance, and referring to it, made an express contract between the city and the gas loanholders, pledging, as security to the said loanholders, not only the faith of the city, but the gas works, and the revenues and profits to be derived from the same; and that in order to make this pledge as definite and distinct as possible, the city engaged that the gas works should be managed and controlled by a board of trustees, elected and constituted as they had been while the works belonged to the gas stockholders, that is, that only one-third of the board should be liable to be removed in any one year, one-half of them by the Select, and one-half by the Common Council, rendering it impossible to make any sudden change in the conduct of the business of making gas, which requires skill

and experience, and also removing the works out of the direct influence of political changes.

The city engaged, by this ordinance, that the gas loans should be transferable at the office of the gas works, and the interest thereon payable there, to avoid any possible confusion between these loans and the ordinary city loans; besides which, the trustees were to create and separately invest a sinking fund, for the benefit of the loanholders, and they were to "have the whole control of the said works, and of the said sinking fund, and of all the other funds belonging to said works," and it was further stipulated that they should pay "no part of said funds, nor any part of the profits of said works, to the city treasury, * * * * until the interest and principal of said loans [shall] should be fully paid;" and it was further expressly stipulated, that the price of gas should not be changed, so as to reduce the clear profits of the works below eight per cent. per annum, on the whole amount of the cost of the same. The same ordinance extended the benefit of its stipulations to all the loans which had been, or should be thereafter contracted on account of the said gas works.

It was known that the said city solicitor had entertained and given an opinion to the city corporation, that the ordinary sinking fund of the city furnished no real security, by way of pledge, to the holders of the city loans, as he considered the city sinking fund a mere form of book-keeping on the treasurer's books. It is not improbable that the very special provisions of the ordinance in question were devised to obviate the effect of this opinion.

The counsel for the plaintiffs, while they contended that all the gas loans stood on the same footing, waived the discussion of this point, inasmuch as the loan contracted under the ordinance of the 17th of June, 1841, is now outstanding, and it had been contracted directly under the provisions of that ordinance.

They also added, that it appeared, by evidence shown the court, that at least two direct efforts had been made by the city corporation, shortly after the inauguration of the city councils,

to set aside the special provisions in favor of the gas loanholders, and to take possession, themselves, of the gas works, its funds, and its revenues. This was shown by two written communications to the trustees of the gas works, as follows:

Common Council Chamber, June 17th, 1854.

At a meeting of the Select and Common Councils, held June 15th, 1854, the following resolution was adopted, to wit:

Resolved, That the members of Council, from the 5th, 6th, 7th, 8th, 9th and 10th wards, be the committee to take charge of the property, effects, &c., of the city proper.

To the Chairman and Members of the Committee on Gas Works.

SIR:

In conformity with the above resolution adopted by the Select and Common Councils, you will please consider all matters and officers therein referred to, as under the charge of the members of the Select and Common Councils from the 5th, 6th, 7th, 8th, 9th and 10th wards, as a committee so appointed for that purpose; and you are requested to furnish to the chairman of this committee a schedule of all the property and effects under the control of your committee, on or before Wednesday next, the 21st inst., at 12 o'clock, M.

(Signed) A. G. WATERMAN,
Chairman.

Attest,
(Signed) JNO. M. RILEY,
Clerk of Common Council.

COMMON COUNCIL CHAMBER,
June 26th, 1854.

TO FREDERICK FRALEY, Esq.

Dear Sir:

At a meeting of the committee of 5th, 6th, 7th, 8th, 9th and 10th wards, the following resolution was adopted.

Resolved, That the chairman have an interview with Mr. Frederick Fraley, and state to him that inasmuch as an appro-

priation had been made by Councils to pay the interest on the funded debt of the city, that it is the unanimous opinion of this committeee that all the funds in the hands of the Trustees of the Gas Works should be paid to the City Treasurer, on the 30th day of June, as indicated by the proclamation of the Mayor.

Extract from the minutes of the committee.

Yours truly,

(Signed) JNO. M. RILEY,

Clerk of Common Council.

The counsel for the plaintiffs submitted to the court, that this contract with the gas loanholders was so plain and so strong that no language could make it clearer or add to its force. They contended that if this was a real pledge, it was a trust which the court was bound to protect, and would protect by injunction against any persons, whether individuals or municipal bodies, who threaten to violate its integrity; and that the trustees, also, who come into court most unwillingly and reluctantly, because they were compelled to do so by the requisition of their cestuis que trust, were entitled to ask the advice and direction of the court as to the performance of their duties in the difficult and embarrassing position in which they were placed. There was no doubt that the city of Philadelphia had sold to the holders of these gas loans a security with a representation as to its character and effect, which, if the views of the City Councils are correct, was a mere delusion; the city, however, receiving a large benefit in the price of those loans, in consideration of the peculiar advantage to be attached to them, and the takers of them being subjected to the payment of that price upon the expectation of receiving something that would secure them beyond all doubt or question.

It remains now to be ascertained whether this security, solemnly and plainly plighted, rests in honor only, which the city may, if so disposed, violate, or whether it has legal vitality

and efficacy, which the court will protect and enforce; and it would not be an unfortunate thing, if the members of the new City Councils should learn thus early, that as bodies, they are no less subjected to the control and restraints of the law than as individuals.

The counsel for the plaintiffs concluded by saying that the arguments submitted on behalf of the city intimated a power in the City Councils to render valueless the pledge of the gas works to the gas loanholders, even if that pledge were valid; but they did not for a moment doubt that the respectable citizens who constituted the two branches of the City Councils would promptly submit to and cheerfully adopt for their guidance any clearly expressed decision of the Supreme Court of the State.

To this allegation and argument of the plaintiffs' counsel, Isaac Hazlehurst, Esq., counsel for the defendants, replied in substance, as follows:

The complainants, in their bill filed, pray for an injunction to perpetually restrain the city of Philadelphia and its agents, from interfering with the Trustees of the Philadelphia Gas Works, who are one of the complainants. And further to restrain them from any attempt to invalidate the trust, alleged in the bill to exist, or the security, set forth in the bill, of the holders of the loans therein mentioned, or to take possession of the Gas Works and its machinery.

From what the said defendants are to be specially enjoined, they are not informed, and the Court are requested to require the complainants to state the same.

The said defendants are a municipal corporation; and their legislative body, the Select and Common Councils, are vested with authority and power to make certain local regulations, and among such powers is that to provide for the lighting of the city. To restrain them, therefore, generally, from making by-laws to regulate their own Gas Works, with a view to such lighting of the City, it is submitted, would operate injuriously upon the citizens. It is proposed to pass certain laws relat-

ing to these Gas Works, and it is submitted to the Court that it is after such laws have been enacted, that the interference of the Court should be asked. If the Court should, according to the prayer of the bill, enjoin them from invalidating the said trust or the securities mentioned, its effect would be to forbid the legislative body of the corporation to pass any law upon the subject of the Gas Works, because in the opinion of the loanholders or the said trustees, such laws might invalidate such security, without such opinion being founded in any legal reason.

The trustees of the Gas Works are appointed by the Councils of the said city. The corporation of the city of Philadelphia is one of its cestui que trust as well as the loanholders who are among the complainants. To restrain the city of Philadelphia "from interfering or intermeddling with" the Trustees of the Gas Works, would prevent them from discharging them for breach of duty or for any cause which would legally justify their removal.

It is not the intention of the defendants to interfere with the security of the loanholders, and in the legislation of the said Councils upon the subject, care was taken to recognize the rights of these loanholders. This legislation will be hereafter particularly mentioned.

[Here Mr. Hazlehurst referred in detail to the several ordinances passed by the city between 1835 and 1851.]

When Councils proceeded to organize, as they were required, the department to whose care the Gas Works and their incidents were to be assigned, it was ascertained that there were great difficulties in the way of harmonizing the arrangements in existence in the various corporations into which the county of Philadelphia had previously been divided.

These difficulties arose from these facts: The old corporation of the city owned and managed the Gas Works which have been before spoken of. The district of Spring Garden owned a gas works, which was managed and controlled by the corporate authorities, without the intervention of any board of trustees, or other

kind. In the District of the Northern Liberties was a gas establishment, owned and managed by a private corporation, who supplied the citizens with gas, and between which and the said District a contract existed by which the former agreed to furnish and the latter to receive a supply of gas for the public lamps in the District at a fixed sum. In the District of Kensington a similar state of things existed, with the addition that the gas corporation were required to sell to the District, after the year 1848, their gas works, upon receiving a sum equal to their actual cost. In the Borough of Germantown a similar company existed, who supplied gas for the public illumination at a certain sum. In the District of Southwark a chartered company was in existence, but who, though authorized to manufacture gas, were only receivers and distributors of gas. To this end, they erected a gas holder, and bought from the city of Philadelphia gas, which they distributed at an increased and profitable price beyond its cost, to private consumers. From this company the District authorities received a supply for the use of public lamps in the District, at a fixed sum, but the latter were at liberty at any time, in pursuance of an agreement, to that effect, to cease to receive such supply of gas. The corporation of the District of West Philadelphia were the owners of a gas holder and receiver, and by virtue of a contract to that effect, received from the Trustees of the Philadelphia Gas Works a supply of gas, which they again distributed to private consumers, and also supplied their public lamps. The District of Moyamensing received its supply of gas for public and private lighting, directly from the Philadelphia Gas Works, through pipes laid in the District by and owned by the corporation.

The price paid for gas outside of the city of Philadelphia, both by the public and private consumers, was greater, in a more or less degree in different places, than that paid by both such consumers in the city; to equalize such charges, and to harmonize the arrangements for supplying gas, was a duty forced upon Councils by considerations of justice to the inhabi-

tants of the enlarged city, and the necessity of a control over the officers employed in that service.

To place the gas establishments in Spring Garden, West Philadelphia and Moyamensing in charge of the existing Trustees of the Philadelphia Gas Works and their officers, with the same provisions relative to the appropriation of the profits thereof as provided for in the city ordinances before recited, would be manifestly unjust to the tax-payers of the city, since why should the profits of the Spring Garden and the other works mentioned be appropriated to the Trustees of the Philadelphia Gas Works, to be applied to a sinking fund for the benefit of and for the enlargement of works, which, it was pretended, were for the benefit of holders of loans, whose funds had never been placed in the manufactories and machinery whose operations produced them ?

The cost of the Spring Garden Works, of the West Philadelphia Works, and the expense of pipes in Moyamensing were erected and furnished by funds borrowed by those districts; these funds were part of the debt of the new city, whose citizens and property holders were taxed for the payment of its interest, and ultimately liable for the redemption of the principal. If there were any profits from these establishments and works, justice and fair dealing demanded they should be applied to reducing the burden of the tax-payers. Besides, some of the provisions of the Consolidation Act, which have been before set out, forbade any such arrangement. How could funds received from these establishments be received and disbursed in the face of that provision that requires that all officers concerned in the disbursement of moneys should be elected by the popular vote ? No committee of Councils could audit the accounts of the Trustees, and there is in their employment no officer but those appointed by themselves. The publicity, accountability and simplicity, stipulated for by the Consolidation Act would be entirely avoided.

The plaintiffs claim that the personal property of the Gas

Works, and the rights under the ordinances referred to, are vested in them, with full powers to manage and control the same, under the supervision of the city; and this supervision is called in the argument "remote supervision."

It is understood that the plaintiffs insist, that the City of Philadelphia has no right to discharge the existing Trustees, and abolish the office; no right to fix the price of gas, unless at a rate that will produce a certain sum of profits; no right to manage the Gas works in question, except through the intervention of a Board of Trustees, constituted as in the manner set forth in the ordinances which have been referred to.

The defendants allege that the City of Philadelphia has the right to discharge the existing Trustees, and abolish the office; to fix the price of gas at pleasure; to manage the Gas Works by such officers as they may appoint, in subordination to and in compliance with the provisions of the Consolidation Act, and to reduce the amount of appropriations to the sinking fund, or abolish it.

The defendants make this allegation, by force of the legal proposition, that a power, particularly a legislative power, given to a corporation cannot be transferred by it to another body or person, nor can the right to exercise such power to any extent which the design of the corporation require, be abandoned or extinguished.

The corporation of The Mayor, Aldermen and Citizens of Philadelphia was a public corporation, with legislative powers within certain limits, and with certain other franchises to be exercised and employed for the people of the city of Philadelphia, of which it was the trustee.

Among these franchises was that of borrowing money. If this was exercised, the corporation was bound to pay the interest it agreed to pay, and reimburse the principal, because the contract of borrowing was within its prescribed powers. But it would have no right to pledge for the payment of interest, or repayment of the loan, her public property, because that public property is vital to her existence, and necessary to the exercise

of the very end of her being, the exercise of public franchise. Suppose the commissioners of a county were to borrow money and pledge the county buildings, the court house and the jails for its repayment, and a creditor were to seize them for repayment of his loan, would he be allowed to do so upon the allegation that it was his money that built them? The public interests would demand that he should be answered that those buildings were part of the machinery of government of the county, and necessary to its existence, and he would be so answered, and told to look to the proceeds of taxation or county revenue for his redress.

Public property, that is, property necessary for and used for governmental purposes, is not the subject of a mechanic's lien, nor is it liable to taxation.

The corporation of The Mayor, &c., were authorized to make provision for "enlightening the streets," and to assess taxes for "purpose of lighting the streets;" and when the corporation in 1835 enacted an ordinance to borrow money and provide for the construction of gas works, they only exercised the franchise granted to them. The public lighting was that which the corporation was authorized to provide—the private lighting was incidental.

But the corporation cannot transfer its franchises, or limit their exercise of them. In the case reported in 6 Wheaton, 598, the corporation of Georgetown regulated and graded a street, and subsequently altered the grade and regulation to the injury of property on the street. The owners of the latter brought suit, and endeavored to sustain it upon the ground that the first regulation of the street exhausted the power of the corporation, and that therefore the subsequent regulation was made without lawful authority. But the court decided that the power was a continuing one in the corporation. The same point was decided in Randolph v. The Mayor, &c., 4 W. & S. 514. So also in Ripka's Appeal, 9 Harris, 55, Judge Lewis holds this language in giving the opinion of the court: "By the act of 13th July, 1842, the committee ap-

pointed by the Burgess and Council were not only empowered to make the survey, but were expressly '*enjoined* and *required*' to do so. There is a difference between a *naked power*, which lies at the election of the party to execute or not, at his pleasure, and an *official duty* which he is under a legal obligation to perform. In the latter case the preservation of the public rights demands that the *whole duty* be performed; and when no time is prescribed within which it is to be completed, the performance of part at one time is no reason why the residue should not be performed at another."

Now for the City of Philadelphia to authorize a Board of Directors to take charge of their works, used for the purposes of public lighting, receive the proceeds, pay no portion into the treasury of the city, and to invest them with full powers to manage and control them, is the same thing, substantially, as if the city corporation had transferred their franchise of lighting the city.

Suppose the corporation should conclude it was for the public interests that gas should be furnished at a lower rate than it cost to manufacture it, and make up the deficiency out of the funds of the city, why should they be prevented? The water works of the city have never paid the interest on their cost and expenses, and yet the sum charged to water tenants for the use of water, has never been regulated by the cost of its delivery. But by the construction put upon these ordinances, the price of gas must be fixed at such a price as will enable the works to pay a profit of at least eight per cent. upon their cost; and before this price can be estimated, the salaries of officers fixed by the trustees, and the expenses of the works managed by them, in their own mode and manner, must first be deducted.

By the position of the complainants, the corporation has no right to fix salaries, or to regulate expenses; their duty is the very humble one of saying to their constituents, that the Trustees of the Gas Works require them to demand of them such prices for the gas they use as will enable the trustees to pay

what salaries they think fit, incur such expenses as they desire, and make a profit of eight per cent. upon the invested capital. Now, no public corporation can so divest itself of its powers of government.

The defendants submit, that these subjects, concerning which, the plaintiffs ask the advice and direction of the court, are not now before the court; and that the court will not advise thereon until the answer is put in.

A court of equity never decrees the payment of money before account taken; and it is submitted, that in the present case it will require proof whether the expenses of the trustees cannot be reduced before it will direct an increase in the price of gas to be charged to the citizens.

The counsel for the plaintiffs stated that—in answer to the argument of the counsel for the city, that the contract made by the ordinance of the 17th of June, 1841, so far as it deprived the city of the right of changing the trustees, and regulating the price of gas at pleasure, was ineffectual, inasmuch as that right was a franchise or right of the corporation, the power to exercise which to any extent the design of the corporation required, could neither be abandoned, extinguished, nor restricted,—it might be said that this proposition resulted in a conclusion of frightful importance; because if the city made a contract and had the power to make it, it was invalid by the argument of the defendants' counsel, but if it made a contract which it had no power to make, it was of course altogether illegal; and hence it would follow that the city corporation could make no valid binding contract. The error of the city councils consists in this, that they failed to make the discrimination between two sets of objects entirely distinct, which are so recognized by our law, and which, in the civil law, were divided into two classes, under the respective heads of "*res publica*" and "*res communitatis.*" The former embrace the legislative powers of a municipal corporation, the latter refer to the property of a municipal corporation, among which, by way of illustration, is given the water works of a town; as to the former, the argument of the defend-

ants' counsel is correct; but it has always been held, that in regard to the property of a municipal corporation, the corporation stands in exactly the same position as private corporations or individuals do in regard to their property. Any other conclusion would be disastrous in England, and in this country too. In every State, and probably in many parts of this State, private corporations supply towns or parts of towns with both water and gas, under contracts with the corporations concerned, upon the faith of which capital has been largely invested. All this, however, may be considered as purely speculative reasoning.

The Trustees of the Philadelphia Gas Works, under a contract between the city and gas loanholders, are in exclusive possession of certain real and personal property pledged as security for the gas loanholders, from whose money, contributed on the faith of that pledge, the gas works have been exclusively created and built. To maintain that they have not a right to retain possession of this property until those for whose security it has been pledged and with whose money it has been purchased have been fully paid, is a proposition too absurd to discuss.

The plaintiffs' counsel closed their argument with a summary of their case, as follows:

The trustees, during the existence of the stockholders, were standing between them and the city—by a mutual contract, the trustees of both; and they are now in a like position as to loanholders.

The trustees have, by virtue of said ordinances, erected and extended the works; for that purpose, buying materials, disbursing money, employing agents, manufacturing and selling gas, and collecting the price thereof, and making rules and regulations for its use. The personal property of said works, and the rights under said ordinances, are vested in them, with full powers to manage and control the same, under the supervision of the city.

The several ordinances authorize the *trustees* to borrow

money, and to set apart sinking funds to secure what they borrow, and to pay principal and interest of loans.

The city carefully marks its distinctness from the trustees, for all purposes except those of remote supervision. It leases its real estate to them; it pays them for its gas. And while it becomes the debtor for the loans, it pledges "the said [gas] sinking fund, and the *buildings*, apparatus, pipes, fixtures, and the income and profits of the said gas works," as security for the payment of said loans.

The ordinance *of June* 17*th*, 1841, is sufficient for our purpose. We *might* found our argument on prior ordinances, but here there is firm ground for it.

An ordinance referring to dealings of a corporation with individuals, adopted and acted upon by them, makes a contract with them. Ang. & A. on Corp., §§ 238–9–40, and cases there cited.

Setting aside for the present other loanholders, and confining ourselves to those under the ordinance last mentioned, certain persons come forward upon the faith of this contract, and loan their money upon the pledge of a sinking fund, buildings, apparatus, pipes, fixtures, and the income and profits of the works. At the time they make the loan, this mortgaged property is under the control and management of these distinct trustees.

It is important to these persons about to embark their money, that this control and management shall continue. They therefore require the express declaration in the ordinance, that, for their better security, "the said works shall be controlled and managed by a board of trustees, elected and constituted as heretofore, who shall have the whole control and management of said works, and of the said sinking fund, and of all the other funds belonging to said works."

The force of negative words is added to make the intent clearer. The loan takers require an agreement that "the said trustees shall pay no part of said funds, nor any part of the profit of said works, into the city treasury, but shall apply and appropriate the same as is directed by this ordinance, until the

interest and principal of the said loans shall be fully paid, as they become due, to the said loanholders."

A person advances money on the pledge of personal property, with the agreement that the latter shall remain in the hands of a third person until the money is paid; for his better security can the debtor demand a re-delivery of the mortgaged property to himself, before the debt is paid? The city is in the precise situation of this debtor. The trustees are the holders, by agreement, of the mortgaged property.

But our position has additional strength. The life of the loanholder's security is the activity of the mortgaged property in the employment of gas making. By express agreement, this manufacture is confided to experienced hands, taken out of the political, impulsive power of Councils, except to a modified extent, and committed to this more conservative, derivative body, the trustees.

But the loanholders have a still stronger ground. The pledged property is the very creature and fruit of their loans. They are secured by what their money has produced.

Another engagement is added to this pledge; the loanholders fearing lest the indirect powers of Councils, exercised by usage, if not by the letter of the ordinance, such as the power of regulating the price of gas, might undermine their security, they require a further express contract, "that the price of gas as now fixed shall not be reduced * * * at any time so as to reduce the clear profits below eight per centum per annum on the whole amount of the cost of the said works, until all the loans contracted for, or that may be hereafter contracted for, shall be paid."

The city now threatens and attempts to seize the mortgaged property, and has actually so diminished the price of gas that the contract for the security of the loanholders is already broken. The profits will not now produce eight per cent. on the loans, at the present price of gas.

At least as to the loans under the ordinance of June 17, 1841,

this argument is complete. Plaintiff, Stephen G. Fotterall, holds some of that loan. It cannot be paid off without his consent. If *he* can hold fast to the trust for that, the trustees are bound to guard it for the other holders of that loan. The sinking fund holds much of it.

But the words of this ordinance involve all prior and all future gas loans. Section 2d speaks of "all the loans contracted for, or that may hereafter be contracted for," and immediately following it is the 3d section, speaking by relation back of "*said loanholders.*" The trustees are to have control of "the said sinking fund and of all the other funds belonging to said works."

These different loans and different ordinances are so inextricably entangled in one system, that as one loanholder fares, so must all others. The sinking fund for all the loans is one,—a unit. It is, in part, itself composed of these very gas loans. Loans of June 17th, 1841, are part of the security of all the loans. The ten per cent. under later ordinances drops into the same strong box with the eight per cent. under earlier ordinances. The share of each class of loanholders in the fund is undiscriminated, unascertainable.

These remarks are offered to show that all loanholders stand alike in this respect. But it is enough for the plaintiffs, if the privilege of retaining the trustees resides only in those of June 17th, 1841.

Trusts are eminently within the jurisdiction of this Court, as a Court of Equity. It is useless to argue that it will protect them by injunction, if they are threatened as here.

But the plaintiffs ask more. A trustee is entitled to the advice and direction of equity in the matter of the trust where his duty is doubtful. Curteis *v.* Chandler, 6 Mad. 84; Buccle *v.* Atleo, 2 Vern. 37; Dimmock *v.* Bixbey, 20 Pick. 368–374.

If the trustees have the right to raise the price of gas without an ordinance of the city, it is their duty to do so. They ask advice and direction of the Court as to this; and also, whether or not it is their duty to collect by compulsion the amount due

from the city, the absence of which is likely to give great inconvenience. If one of their ordinary customers refuses to pay, they shut off the gas from his house. Is the same duty compulsory on the trustees as to the public lamps, until the city pays for what has been heretofore furnished?

Or while the city stands in its present position, if in spite of the injunction we expect, it remains hostile, and will neither raise the price of gas nor pay its bill—if the trustees are not bound to use coercion as to the latter, and have no power as to the former, can they use the sinking fund for their imminent emergencies? They ask advice and direction as to this.

The public nature of the subject of their trust gives them a better grace and a clearer equity in this Court. 12 Gil. & J. 1.

OPINION OF CHIEF JUSTICE LEWIS.

This is a motion for a special injunction to restrain "The City of Philadelphia" for interfering or intermeddling with the Trustees of the Philadelphia Gas Works, and from any attempt to invalidate the trusts, or the security in the hands of the said trustees for the holders of the loans made for the construction and extension of the works, or to seize or take possession of the works, revenue or profits. The works were originally constructed by means of funds raised by subscriptions to stock made by private individuals in pursuance of an ordinance passed on the 21st March, 1835. By the terms of that ordinance the works were the private property of the stockholders, and their only source of reimbursement was the profits. The city was not liable for any thing beyond the application of the money paid into the city treasury by the stockholders. By that ordinance, which formed the contract between the city and the stockholders, the works were to be under the management of *twelve* trustees, to be chosen by the Select and Common Councils. The terms of office of the trustees were so arranged that one-third of their number would go out every year, and their places were to be supplied by the annual election of *two* trustees by the Select, and the same number by the Common Council. By the same ordinance the city had the right, if at any time the Select and Common Councils might deem it expedient, to take possession of the works and convert the stock into a loan redeemable in twenty years from the date of conversion, bearing an interest of six per cent. per annum, payable half yearly on the first days of February and August. Under this arrangement the money was raised, the trustees were appointed, and the works constructed. By subsequent ordinances, assented to by the stockholders, the works were from time to time extended, and loans made for the purpose of defraying the charges. But on the 14th of January, 1841, an ordinance was passed containing many provisions so beneficial to the city, and, at the same time so disadvantageous

to the stockholders, that there was good reason to apprehend that the latter would not consent to them. To meet that contingency it was provided in the ordinance that if the stockholders did not consent to the terms proposed before the 25th February, 1841, the Mayor, Aldermen, and Citizens of Philadelphia should, on the 1st of March, 1841, take possession of the works in their own right, and the stock should be converted into a loan in the manner provided by the original ordinance of association—the works to remain under the direction and superintendence of the trustees, until otherwise provided for. The ordinance of the 14th January, 1841, was not accepted; and the city, in pursuance of an ordinance of the 3d June, 1841, issued certificates of loan to the several stockholders. This brings us to the ordinance of the 17th June, 1841. By that ordinance a further loan of $125,000 was authorized for the purpose of extending the works. The city was to borrow the money in such sums as might be required by the trustees. The certificates of loan were to be transferable at the office of the Philadelphia Gas Works. The rate of interest was to be fixed by the trustees. It was to be payable semi-annually at the Gas Works. "The faith of the city, the sinking fund, and the buildings, apparatus, pipes, fixtures, and the *income and profits* of the said gas works" were expressly "pledged for the punctual payment of the interest, and for the ultimate reimbursement of the principal of *all the loans made* for or on account of said gas works, as the same shall become due; and, *in order that provision may be made for the same*, the said trustees were authorized and *required* to set apart all the clear net profits that may remain after paying the interest on the *said several loans*, to constitute a sinking fund, which with the interest thereon, was to be invested in loans and kept separate from the other funds of the said works." And "*for the further security of the loanholders* of said works, *the faith of the city* was expressly pledged, that the price of gas should not at any time be reduced so as to reduce the clear profits below 8 per cent. per annum on the *whole amount of the costs*

of said works *until all the loans contracted for*, or *that may hereafter be contracted for, shall be paid.*" And "*for the further security of the said loanholders,*" it was expressly "*stipulated that the works shall be controlled and managed by a board of trustees elected and constituted as heretofore, who shall have the whole control and management of the said works and of the said sinking fund, and of all the other funds belonging to the said works, and the said trustees shall pay no part of said funds, nor any part of the profit of said works into the city treasury, but shall apply and appropriate the same as is directed by this ordinance, until the interest and principal of the said loans shall be fully paid as they become due to the said loanholders.*" In pursuance of this ordinance, and on the faith of the pledges contained in it, the sum of $125,000 was obtained on certificates issued by the city, in each of which it was particularly set forth that it was "*issued in pursuance of an ordinance of the* 17*th June*, 1841." This made the provisions of that ordinance, so far as they related to the rights of the parties, as much a part of the contract as if they had been set forth at length in each certificate of loan. But the pledges in regard to the price of gas, were made expressly "for the further security of all the *loans contracted or that might thereafter be contracted.*" And the stipulations in regard to the control of the works, and the duty of the trustees to appropriate the profits of them, were also expressly made for *the same loanholders.* In none of the ordinances subsequently passed, is there any provision for the repeal of any part of the ordinance of 17th June, 1841, or any attempt made to place the new loans upon a footing different from those previously made under that ordinance. On the contrary, the certificates to be issued from time to time were, in each ordinance authorizing them, directed to be "*in like form* and *transferable in like manner* with the certificates of the other loans authorized for the purpose of said gas works;" and in each ordinance authorizing a new loan, the trustees were directed to set apart out of the profits of the works, ten per cent. per annum on the amount borrowed, for the purpose of paying the interest

thereon and for reimbursing the principal, &c. "A subsequent statute is never to be construed to repeal a prior one, unless there be a contrariety in them, or at least some notice taken of the former act, *so as to indicate an intention to repeal it.* "The law does not favor a repeal by implication, unless the repugnance be *quite plain.*"—Dwarris on Statutes, 674. "To repeal an express enactment by implication, requires a *strong and clear inconsistency.*" Street *vs.* The Commonwealth, 6 W. & S. 212. We see no such inconsistency, nor any evidence of an intention to repeal the stipulations in favor of all prior and subsequent loanholders for the extension of the gas works. Such a repeal would have been an act of injustice to the original stockholders whose money had constructed the works, and who had accepted certificates of loan in pursuance of the ordinance of the 3d of June, 1841. The repeal would likewise have been an act of gross impolicy on the part of the city, because the only effect of it would have been to leave the works under a mortgage for the loans already contracted, in pursuance of the ordinance of 17th June, 1841, while a question seriously affecting the credit of future loans would have arisen, respecting the power of the city to pledge the works as a security, on which further loans might be obtained for the extension of the works. The ordinance of 17th June, 1841, was, therefore, very judiciously permitted to remain in full force while the city was in the market for the purpose of procuring the various subsequent loans for the extension of the works. It designated the security which was pledged, and prescribed the remedy for making that security available. It placed the pledged property and funds in the hands of trustees, to be selected in such a manner as to secure the confidence of the capitalists who advanced their money.

It is a rule in the construction of contracts, that the law existing when a contract is made enters into it, and necessarily forms a part of it. The remedies prescribed for enforcing performance, are regarded by the parties as constituting that "obligation" of the contract which is within the protection of the constitution. If the remedies were taken away, there would

be nothing but the *moral obligation* left, and it is absurd to suppose that this was the "obligation of the contract" which the Legislature was prohibited from impairing. Plain common sense, responding to the demands of justice, has scattered to the winds the flimsy distinction between the *right* and *remedy*, so far as to declare that any change of the nature or extent of the latter so as to impair the former, is just as much a violation of the compact as if the right itself was directly destroyed. Bronson *v.* Kinzie et al. 1 How. 316. "The objection to a law on the ground of its impairing the obligation of a contract, can never depend upon the *extent* of the change which the law effects in it. *Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligations.*" *Green* v. *Biddle*, 8 *Wheaton* 1. *A contract of mortgage vests an interest; and its main incident is a right to have the land applied in discharge of the debt, either in the way prescribed by the law when the contract was made, or in some form of remedy substantially equal.* Gantly's Lessee *v.* Ewing, 3 How. 707. These principles have been applied to govern the contracts and control the acts of States clothed with all the powers and prerogatives of sovereignty. We see no reason why a municipal corporation which may be created and destroyed by the State at pleasure, should stand upon higher or better footing than its own creator. Like a State, it has its public duties and its private rights. It has no right to enter into a contract which interferes with its duties to preserve the health and morals of the city. It may therefore defeat the title of its own grantee when it becomes necessary to do so in order to abate a nuisance or preserve the public health. The Presb. Church *v.* City of N. Y., 5 Hill, 540; and Stuyvesant *v.* The Mayor of N. York, 6 Hill, 603, are instances of the exercise of this right, and it rests upon the ground, that a corporation,

acting for the benefit of others, has no power to enter into a contract which would prevent it from performing its public duties. Every right derived from it, is holden subject to the restriction that it shall be so exercised as not to injure others. Upon this principle, if the Gas Works should become a nuisance, affecting the health and comfort of the neighborhood, the City Councils, notwithstanding their own lease of the ground, would have the right to direct the removal of the works to a place where they would be less injurious to the public. The Master of the Rolls, in speaking of the *East India Company*, admitted that it had *rights* as a *sovereign power*, but declared that it had also *duties* as an *individual;* and notwithstanding its claim to the right of violating its contract, as an incident to its character as a sovereign power, it was held to be bound by its contracts as a private company. Moodamay *v.* Morton, 1 Brown's Ch. Rep. 471.

The restriction upon the power of a municipal corporation to enter into contracts which may prevent it from performing its duty to the public, is nothing more than the application of the principle which avoids the contracts of individuals when they are detrimental to the public rights. But the contracts which a municipal corporation may make for the purpose of supplying the inhabitants with gas light in their streets and houses, relate to the "things of commerce," as distinguished in the civil law from the "things public," which are regulated by the sovereign. Such contracts are not made by the municipal corporation, by virtue of its power of local sovereignty, but in its capacity of a private corporation. The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as

much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred. These principles are well enforced by Chief Justice Nelson, in delivering the opinion of the Supreme Court of New York in the case of Baily vs. the City of New York, 3 Hill, 538. In that case the acts of the city had relation to the construction of water works; in this they have relation to gas works. But the principle is precisely the same in both cases.

By the contract with the loanholders, the city has placed the works and their income in the hands of trustees as a security for the loans. The loans subsequent to that act were contracted on the faith of that pledge. The city has no more right to disturb the security than a mortgagor would have to demand a re-conveyance without payment of the mortgage debt. To say that the city does not mean to disturb the security is nothing to the purpose. The contract designates the manner in which the trustees are to be appointed. By that system they are placed on a permanent footing, and are effectually guarded against the changes and consequent mismanagement which might flow from the impulsive action of political parties. This arrangement was a very material consideration with those who advanced their money on the faith of it, and the city has no right to change the trustees in any other mode than that prescribed by the compact. A debtor who has made an assignment for the benefit of his creditors, has no right to reclaim the property assigned without payment of his debts: nor has he any right to substitute himself as

a trustee for his creditors against their will. This is the rule even in the case of *voluntary* assignments; but it applies with much greater force to assignments or pledges of property to secure the payment of debts *contracted on the faith of them.*

The act of 2d February, 1854, gives the city no new rights whatever over these works. It merely transfers to the corporation, as enlarged, the rights which the same corporation possessed before the enlargement of its boundaries; and the rights thus transferred are subject to the "trusts, limitations and conditions," which existed before. As owner of the works, subject to the paramount rights of the loanholders, the city may inspect the books, accounts and papers relating to them, and demand an accurate account of the proceedings of the trustees. If she has reason to believe that they are mismanaging the trust to such an extent that her own power of removal, as regulated by the contract, would be an inadequate remedy, she may, like other *cestui que trusts*, apply to the courts of justice for redress. If she thinks, that by a more economical management than that heretofore practiced, the price of gas might be reduced without violating the provisions of the contract with the loanholders, she may file a bill for an account, and ask for the direction of the court on the question. In the meantime, she has no power to withdraw any portion of the income of the works from the trust fund. She has no better right to do it *indirectly* by withholding the payment of any just debt she may owe for gas, than she has to accomplish the same object by a *direct* seizure of the works and their revenues. These rights and duties may very appropriately be assigned to the "*Gas Department*," authorized by section fifty of the Consolidation Act. Whatever powers may be exercised over the gas works of the other incorporated districts now included within the city limits, it is clear that none exist over those in question in this case, except in subordination to the rights of the loanholders as defined by the ordinance of 17th June, 1841. If those rights have been subsequently modified by consent, such modification furnishes no ground for any further deviation from the original contract without consent.

The exigency of the case calls for nothing more at present than an injunction to restrain the city of Philadelphia from attempting to take possession of the Gas Works described in the bill, or to interfere with the trustees therein named, in their control and management of said works, and the incomes and other funds belonging to the same, until the further order of this court.

Let an injunction for that purpose issue upon filing a bond with security in twenty thousand dollars, pursuant to the statute in such case provided.

The Western Saving Fund Society of Philada., et al., *vs.* **The City of Philadelphia, and Robt. T. Conrad, Mayor, &c.**	In the S. C. of Penna. within and for the East. Dist. In Equity. July T. 1854. No. 10.

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